

¹ ALJ Order (May 30, 2008).

addition, respondent argues that the May 7, 2007, report of Dr. Hendler referenced by the ALJ in his Order is not a part of the record in this claim and, in fact, predates claimant's alleged date of accident. Accordingly, respondent argues the ALJ exceeded his jurisdiction in ordering respondent to provide a physician or physicians to evaluate claimant's complaints and to provide claimant with medical treatment and, therefore, the Board has jurisdiction over this appeal. Respondent requests the Board reverse the ALJ's Order in this docketed claim.

Claimant agrees that the ALJ's order of May 30, 2008, is incorrect because he requested temporary total disability compensation and did not request medical treatment at the preliminary hearing. Claimant requests the Board remand the matter to the ALJ for a determination on the issue of temporary total disability benefits, the only issue argued in the May 14, 2008, preliminary hearing held in this docketed claim.

The issues for the Board's review are:

- (1) Does the Board have jurisdiction over this appeal?
- (2) If so, should the ALJ's order for medical treatment be reversed?
- (3) If so, should this matter be remanded to the ALJ for an order on the issue of temporary total disability benefits?

FINDINGS OF FACT

On March 26, 2008, claimant served a seven-day demand letter upon respondent for payment of temporary total disability compensation. No response was received, and this claim proceeded to a preliminary hearing on May 14, 2008, wherein the only issue was payment of temporary total disability benefits. On May 30, 2008, the ALJ ordered respondent to provide a physician or physicians to evaluate claimant's complaints of injury and treat those conditions that are work related. In so doing, the ALJ expressly relied upon a medical report that was not in evidence in this docketed claim.

PRINCIPLES OF LAW

The Board's jurisdiction to review a preliminary hearing order is limited. K.S.A. 2007 Supp. 44-551(i)(2)(A) states in part:

If an administrative law judge has entered a preliminary award under K.S.A. 44-534a and amendments thereto, a review by the board shall not be conducted under this section unless it is alleged that the administrative law judge exceeded the

administrative law judge's jurisdiction in granting or denying the relief requested at the preliminary hearing.

K.S.A. 44-534(a) states in part:

Whenever the employer, worker, Kansas workers compensation fund or insurance carrier cannot agree upon the worker's right to compensation under the workers compensation act or upon any issue in regard to workers compensation benefits due the injured worker thereunder, the employer, worker, Kansas worker's compensation fund or insurance carrier may apply in writing to the director for a determination of the benefits or compensation due or claimed to be due. The application shall be in the form prescribed by the rules and regulations of the director and shall set forth the substantial and material facts in relation to the claim. Whenever an application is filed under this section, the matter shall be assigned to an administrative law judge.

K.S.A. 44-534a(a) states in part:

(1) . . . At least seven days prior to filing an application for a preliminary hearing, the applicant shall give written notice to the adverse party of the intent to file such an application. Such notice of intent shall contain a specific statement of the benefit change being sought that is to be the subject of the requested preliminary hearing. If the parties do not agree to the change of benefits within the seven-day period, the party seeking a change in benefits may file an application for preliminary hearing which shall be accompanied by a copy of the notice of intent and the applicant's certification that the notice of intent was served on the adverse party or that party's attorney and that the request for a benefit change has either been denied or was not answered within seven days after service. Copies of medical reports or other evidence which the party intends to produce as exhibits supporting the change of benefits shall be included with the application.

(2) . . . Upon a preliminary finding that the injury to the employee is compensable and in accordance with the facts presented at such preliminary hearing, the administrative law judge may make a preliminary award of medical compensation and temporary total disability compensation to be in effect pending the conclusion of a full hearing on the claim, except that if the employee's entitlement to medical compensation or temporary total disability compensation is disputed or there is a dispute as to the compensability of the claim, no preliminary award of benefits shall be entered without giving the employer the opportunity to present evidence, including testimony, on the disputed issues. A finding with regard to a disputed issue of whether the employee suffered an accidental injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given or claim timely made, or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board. . . Except as provided in this section, no such preliminary findings or preliminary awards shall be appealable by any party to the proceedings, and the same shall not be binding in a full hearing on the claim, but shall be subject to a full presentation of the facts.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.² Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2007 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.³

ANALYSIS

It appears that the subject Order was issued by mistake. But if not, the ALJ exceeded his jurisdiction by considering a medical report that was not in evidence and by raising an issue, medical treatment, that was not raised by claimant in either his seven-day demand letter or his application for preliminary hearing and was not raised by either party at the preliminary hearing. The purpose of the May 14, 2008, preliminary hearing was to consider claimant's request for temporary total disability compensation, not medical treatment. The ALJ's order is silent as to the requested temporary total disability compensation.

CONCLUSION

(1) The Board has jurisdiction of this appeal because the ALJ exceeded his jurisdiction by going outside the record, by considering an issue that was not before him, and by ordering a preliminary benefit that was not requested.

(2) The order for medical treatment benefits is reversed.

(3) This matter is remanded to the ALJ for consideration of claimant's request for temporary total disability compensation.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Thomas Klein dated May 30, 2008, is reversed, and this matter is remanded to the ALJ for reconsideration of claimant's request for temporary total disability compensation.

IT IS SO ORDERED.

² K.S.A. 44-534a; see *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, rev. denied 271 Kan. 1035 (2001).

³ K.S.A. 2007 Supp. 44-555c(k).

Dated this _____ day of August, 2008.

HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
Clifford K. Stubbs, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge